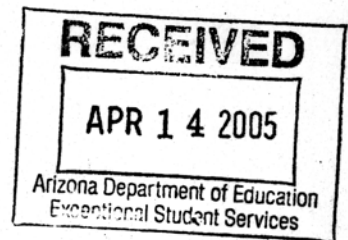


INDIVIDUALS WITH DISABILITIES EDUCATION ACT ("IDEA"), 20 U.S.C. § 1400
ARIZONA DEPARTMENT OF EDUCATION
IMPARTIAL DUE PROCESS HEARING

Sara J. Vance, Hearing Officer
14014 North 8th Place, Phoenix, Arizona 85022
phone (602) 938-1810 fax (602) 938-2163



In the Matter of

[REDACTED] by and through his
Parents, [REDACTED]

Petitioner,

v.

GADSDEN ELEMENTARY SCHOOL
DISTRICT,

Respondent.

)
) **IMPARTIAL DUE PROCESS**
) **HEARING DECISION AND ORDER**
)

) Reference No. 05-008
)

) Hearing Dates: March 8, 9 & 10, 2005
)

) Held at: District Offices
) 1453 North Main Street
) San Luis, Arizona
)

Petitioner: [REDACTED]

Counsel for Respondent: Steven B. Horion, Esq.
Mangum Wall Stoops & Warden PLLC
P.O. Box 10
Flagstaff, Arizona 86002

An index is attached hereto to identify specific personnel providing services to Student and witnesses at the Hearing. The attached index is designed to be detached before release of this Decision and Order as a public record.

I. DUE PROCESS PROCEDURAL HISTORY

A. Due Process Request and Pre-Hearing Matters

On August 21, 2004, Petitioner Student, by and through Student's Parents, (herein, "Petitioner" or "Parents") filed a request for due process ("Due Process Request") against Respondent District ("Respondent" or "District"). The issues for hearing presented in that Due Process Request were clarified in the Hearing Officer's letter dated October 4, 2004, and clarified again in the Hearing Officer's letter dated February 15, 2005. Parents' reimbursement request was clarified in a letter from Father dated November 28, 2004.

A number of pre-hearing telephone conferences were held in this matter. Petitioner was represented by an attorney in this matter until that counsel withdrew on November 23, 2004. The due process hearing ("Due Process Hearing" or "Hearing") was initially scheduled for November 29, 2004, to accommodate that attorney's trial schedule. Upon withdrawal, the hearing date was vacated to ensure Parents were given an opportunity to obtain new legal counsel, and/or have an adequate opportunity to prepare for the Hearing. Alternative dates for the Hearing were established in the Hearing Officer's letter of December 16, 2004 (confirming a December 14, 2004 telephone conference). Subsequently, the Hearing was again re-scheduled to allow evaluations of Student to proceed prior to the Hearing. All extensions of the 45 day requirement for holding the Due Process Hearing were either requested by both parties or were requested by one party without objection by the other party. These extension requests and the grounds for granting those requests are detailed in Due Process Hearing Timeline Extension Confirmations dated September 21, 2004, December 2, 2004, December 16, 2004, and February 2, 2005.

On February 11, 2005, a new Individualized Education Program was developed for Student (herein, "2/11/05 IEP"). In a pre-hearing telephone conference held on February 11, 2005, the Hearing Officer proposed that issues regarding the 2/11/05 IEP be included in the issues to be determined at the Due Process Hearing. Petitioner objected to determination of any issues involving the 2/11/05 IEP in the Due Process Hearing, so they were not addressed in the Hearing. Petitioner retained the right to file due process in connection with the 2/11/05 IEP.

Both parties timely disclosed their witness list and exhibits (as stipulated by the parties).

B. Evidence Introduced at Due Process Hearing

Testimony and documentary evidence were admitted at the Due Process Hearing. Twenty two (22) witnesses testified at the Hearing. See Transcript of Due Process Hearing, Volumes I-III (herein, "Tr., p. _"). During the Due Process Hearing, there were no objections to admission of exhibits submitted in disclosure. Tr. p. 7. Additionally, Petitioner presented 2 additional exhibits that were admitted without objection. Petitioner's Exhibits 1 through 28 ("P. Ex. _") were admitted into evidence.¹

¹ Tr. pp. 8, 388, 424. Parents submitted exhibits of some daily classroom reports in Spanish, and the parties were informed that those exhibits would not be reviewed by the Hearing Officer unless translated in connection with witness testimony.

District also presented 2 additional exhibits that were admitted without objection. Respondent District's Exhibits numbered 1 through 15 (herein, "D. Ex.") were admitted into evidence.

C. Other Material Due Process Hearing Matters

At the Due Process Hearing, the Hearing Officer indicated that one sub-issue in the issues for the hearing appeared to be placed under the incorrect school year. The parties agreed that issue should be properly placed in the correct school year, and that issue for hearing was amended as set forth below. Tr. pp. 260-262.

At the Due Process Hearing, both parties requested an extension of the 45 day deadline to allow the Hearing Officer time to review the transcript of the Hearing prior to issuing this decision. Tr. p. 436. The parties' request for an extension of the 45 day requirement for holding the Due Process Hearing and issuing the final decision and order was granted for the reasons set forth in a Due Process Hearing Fifth Timeline Extension Confirmation dated March 14, 2005. Additionally, at the conclusion of the Due Process Hearing, District requested if District could provide copies of relevant legal authorities to support District's position, and to provide legal requirements for instructional aides. Father agreed that District could do so. District provided additional information in District's filed letter dated March 21, 2005, and in response Parents submitted an additional letter dated March 24, 2005.

II. DUE PROCESS ISSUES

The due process issues to be determined in this case are:

- (1) Did District deny Student's right to a free appropriate public education ("FAPE") during the 2003-2004 school year, based on implementation of Student's 2003-2004 Individualized Education Program ("2003-2004 IEP") in the following areas:
 - (a) Did District provide appropriate occupational therapy ("OT") services and physical therapy ("PT") services?
 - (b) Did District provide supplementary aids and services as required by the 2003-2004 IEP [REDACTED]?
 - (c) Did District provide appropriate aide services by qualified and trained aides?
- (2) Did District deny Student's right to a FAPE during the 2004-2005 school year (through the date of implementation of the 2/11/05 IEP) based on the terms of Student's IEP developed from an IEP meeting held on May 12, 2004 ("5/12/04 IEP"), specifically:
 - (a) Did District fail to provide prior written notices required to be provided under IDEA in connection with the 5/12/04 IEP?
 - (b) Does the 5/12/04 IEP include appropriate goals for OT and PT?

- (c) Does District have appropriate personnel to provide OT and PT services?
- (d) Is assistive technology required to be provided to Student to meet speech goals?
- (e) Does District have appropriate qualified and trained support staff (aides) to meet Student's safety needs?
- (f) Is Student's teacher required to be Life Skills educated or trained to provide FAPE to Student?
- (g) Did District provide appropriate transportation services due to lack of air-conditioning?

III. FINDINGS OF FACT

General Findings of Fact

1. Student is [REDACTED] years old, and has been receiving special education and related services under the Arizona category of [REDACTED]

[REDACTED] P. Ex. 2-4 & D. Exs. 7 - 11.

2. Throughout the time period at issue, Student has been placed in a self-contained classroom with six other students, with services provided by Special Education Teacher, and six instructional aides. Tr. p. 17.

3. Parents are extremely dedicated, loving and caring parents to Student. Parents are highly motivated to protect Student and Student's rights, and Father has engaged in an extensive campaign to assert what Father perceives as those legal rights for a number of years. See *generally* D. Ex. 1; P. Exs. 12, 17-21; Testimony of Mother; Testimony of Mexico Therapist, Tr. pp. 74-75.

4. As detailed in part below, Father has written extremely harsh, demanding letters, often threatening legal action against District, whenever Father believed that Student was treated improperly or that Student was not receiving all special education and related services that Father understood to be appropriate. Father's actual requests were sometimes reasonable in terms of issues raised, but even those reasonable requests routinely included accusatory and often harsh language that was not justified by the circumstances, and that was often unfounded on legal grounds. See *generally* D. Ex. 1; P. Exs. 12, 17-21.

5. Generally, Parents dispute that special education and related services are provided to Student unless Parents (1) witness such services being provided or Parents receive specific minute-by-minute verification of the provision of such services; and (2) Parents have personally approved related service providers. See *generally* Testimony of Mother; D. Ex. 1; P. Exs. 12, 17-21.

6. Father has refused to attend MET and IEP meetings that included Special Education Director. D. Ex. 1 [6/7/04 & 7/13/04 letters from Father]; Tr. pp. 278-279.

7. In response to Father's written attacks, District has made extensive efforts to accommodate Parents' concerns, including, without limitation: (1) allowing Parents to obtain physical therapy services from Mexico Therapist that were reimbursed by District through February, 2004; (2) having Special Education Director not participate in IEP meetings for Student in 2003; and (3) providing daily summaries of Student's activities in the classroom. Testimony of Assistant Superintendent, Tr. pp. 239-240; Testimony of Special Education Director, Tr. pp. 282, 286; Testimony of Special Education Teacher, Tr. pp. 25-26, 29 & 50; P. Exs. 6-8; D. Ex. 1 [7/26/04 DOE letter, at p. 3].

8. Father's correspondence to, and demands on, District has had an adverse affect on District's ability to obtain and retain qualified related service providers. Even though service providers may have stopped providing services to District for reasons other than Father's threatened and actual legal actions, Father's actions have been a significant factor in making service providers reluctant to provide services to District. Testimony of Assistant Superintendent, Tr. pp. 240-244; Testimony of Special Education Director, Tr. pp. 281-282; Testimony of Former Physical Therapist, Tr. pp. 200-201, 216; Testimony of Occupational Therapist, Tr. pp. 128-132.

9. Father's accusatory correspondence to District personnel has had an adverse affect on District personnel. Testimony of Assistant Superintendent, Tr. pp. 240-244; Testimony of Principal, Tr. pp. 358-259; Testimony of Special Education Director, Tr. pp. 280; Testimony of Instructional Aides, Tr. pp. 167-172; 249-250. As an example, on February 10, 2004, Father sent a letter to Special Education Teacher complaining that Student has returned home with his backpack incomplete. That letter stated that there was overwhelming evidence that Student was being serviced by unqualified and untrained staff. Father also complained that on one occasion Student arrived home in clothes different that Student wore to school. Based on these facts, Father concluded there were many federal civil rights violations. D. Ex. 1 [2/10/04 letter]. In response, Student's Special Education Teacher requested a transfer from Student's classroom. D. Ex. 1 [2/18/04 letter]. Although Special Education Teacher later withdrew that transfer request, such accusations by Father have made Special Education Teacher and Instructional Aides reluctant to provide services to Student. Testimony of Special Education Teacher, Tr. pp. 34-35, 57-58 & 65.

10. From June, 2001 to the present, the Mexico Therapist has provided physical therapy services to Student in Mexico. Mexico Therapist is qualified to provide physical therapy services in Mexico. Parents have paid Mexico Therapist in cash for such payments. Student has benefited from those services. Testimony of Mexico Therapist, Tr. pp. 69-74 & 79; Testimony of Mother, Tr. pp. 401-402; D. Ex. 10, p. 2; P. Exs. 9-11.

11. There are no health or safety concerns in Student's classroom. Testimony of Mother, Tr. pp. 408-409; Testimony of Nurse, Tr. p. 383.

2003-2004 IEP Findings of Fact

12. On May 21, 2003, an IEP meeting was held, and the 2003-2004 IEP was developed. D. Ex. 10; P. Ex. 1.

13. Among other things, the 2003-2004 IEP provided that occupational therapy ("OT") services would be provided to Student for 60 minutes per week by "OT/Sped Staff". Despite the reference to "Sped Staff", the intent of the 2003-2004 IEP was for Student to receive 60 minutes per week of direct services by an occupational therapist (and/or as appropriate, through a certified occupational therapist assistant), with additional services to meet OT goals and objectives provided by Special Education Teacher and instructional aides. D. Ex. 10, p. 17; P. Ex. 1, p. 17; Testimony of Special Education Director, Tr. p. 301.

14. From September 2, 2003 through October 30, 2003, except for one week that Student was absent, District provided 60 minutes per week of OT services by a licensed occupational therapist as required by the 2003-2004 IEP. D. Ex. 15; Testimony of Special Education Director, Tr. pp. 283-285 & D. Ex. 1 [3/17/04 letter].

15. From the end of October, 2003 through January 16, 2004, District did not have a qualified occupational therapist providing OT services to District students, including Student. D. Ex. 1 [2/17/04 letter from Special Education Director]. On December 1, 2003, Father sent a letter to District requesting approval for reimbursement for OT services to be provided by Mexico Therapist. D. Ex. 1 [12/1/03 letter]. On January 23, 2004, Father sent a letter to District indicating that he was contracting for, and would request reimbursement for, OT services. D. Ex. 1 [1/23/04 letter]. There was insufficient evidence to show that the Mexico Therapist was qualified to provide OT services. P. Ex. 9; Testimony of Mexico Therapist, Tr. pp. 77-78. However, District reimbursed Parents for 11.5 hours of compensatory OT provided by Mexico Therapist due to District's lack of a service provider from November, 2003 through January 16, 2004. Testimony of Special Education Director, Tr. pp. 284-285.

16. On or about January 19, 2004, Occupational Therapist began providing OT services for District. D. Ex. 1 [2/17/04 letter from Special Education Director]. Occupational Therapist is certified to provide OT, and has the requisite educational requirements for such certification. Testimony of Occupational Therapist, Tr. pp. 119-121. Student did not receive OT services on January 20, February 3, February 10 or February 24, 2004, because Student was absent from school. Student did not receive OT services during the last week of January, 2004, when such services should have been provided. Occupational Therapist first provided OT services to Student on February 17, 2004. D. Ex. 15; D. Ex. 3.

17. On February 24, 2004, Father sent a letter to District stating that therapists must be approved by Parents, demanding that services not be provided to Student until those therapists are accepted by Parents, and demanding reimbursement for services (including OT services) until those therapists are approved. D. Ex. 1 [2/24/04 letter from Father, at p. 2]. Despite Father's objection, Occupational Therapist provided one hour of OT services to Student on each of 3/16/04, 3/23/04, and 4/6/04. D. Ex. 15 [4/12/04 notes]; P. Ex. 22, at 2. On April 8, 2004, Father demanded that Parents were entitled to reimbursement for occupational therapy until Parents had met

Occupational Therapist, discussed Student's goals with Occupational Therapist, and been provided weekly reports on implementation. D. Ex. 1 [4/8/04 letter].

18. The 2003-2004 IEP also provided for (1) physical therapy by a physical therapist for 1 hour per week; (2) use of the [REDACTED] 600 minutes per week; (3) switches, [REDACTED] and writing aids for 300 minutes per week; and (4) special education services provided by the Special Education Teacher and assistants. D. Ex. 10; P. Ex. 1. Although the 2003-2004 IEP does not otherwise specifically provide for aide services, it indicates that Student needs (and Student does need) one-on-one assistance throughout the school day. D. Ex. 10, p. 21; P. Ex. 1, p. 21.

19. Former Physical Therapist was ready, willing and able to provide physical therapy services to Student for District during the 2003-2004 school year. Testimony of Special Education Director, Tr. pp. 287-288; Testimony of Former Physical Therapist, Tr. pp. 203; D. Ex. 1 [8/8/03 memo]. The reason that Former Physical Therapist did not provide such services is that Parents had demanded that Former Physical Therapist not provide services to Student; this refusal was based in part on Parents' disagreement with the amount of services Former Physical Therapist recommended in 2001, and in part based on Parents' perspective that Former Physical Therapist's previous services has not resulted in progress. P. Ex. 17, p. 13; D. Ex. 1 [4/12/04 letter]; Testimony of Special Education Director, Tr. pp. 287-288; Testimony of Mother, Tr. pp. 401-402. Based on the testimony of Former Physical Therapist, Former Physical Therapist lacked an appropriate understanding regarding the amount of related services Student would be entitled to by law. Tr. pp. 207-221. The provision of an inadequate amount of services could prevent appropriate progress by Student. However, Former Physical Therapist was qualified to provide physical therapy services, and one hour per week of such services (as required by the 2003-2004 IEP) would have been sufficient to benefit Student. Testimony of Former Physical Therapist, pp. 199-200, 220-221; Testimony of Physical Therapist, pp. 105-113.

20. Student was provided services with the [REDACTED] and [REDACTED] as required by the 2003-2004 IEP, although specific records measured by minute regarding use of that equipment were not always maintained on a daily basis. Testimony of Special Education Teacher, Tr. pp. 21-22, 26, 36; Testimony of Instructional Aides, Tr., pp. 168, 173, 179-180, 272; P. Ex. 8, pp. 9-11, 32-34, 53-55, 80-83.

21. As of August 12, 2003, District had provided a [REDACTED] an augmentive communication device, for Student although at some point in time that device was broken and had to be replaced. D. Ex. 1 [12/11/03 letter from Father, p. 2]; P. Exs. 3 & 17, p. 16.

22. Special Education Teacher is assisted in the classroom by six instructional aides. When all District staff are present, there is a one-to-one ratio of staff to students in Student's classroom. Those instructional aides are rotated each week so that students do not become dependent on a particular aide. Thus, each week, a different instructional aide is assigned to Student. Tr. pp. 23, 166-167, 250.

23. Instructional Aides who provided services to Student in the 2003-2004 school year all have an associates degree or at least 60 hours of college credits

(Aides 1, 2, 5, & 6) or have been working for District prior to January 8, 2002 (Aide 7, Tr. pp. 262-263). Some college credits are earned equivalency credits from Mexico colleges. One aide who provided services for only two months in Student's classroom had only earned 31 college credits, but there was no evidence of the time period that the aide provided services or when the aide was initially hired by District. Testimony of Instructional Aide 4; P. Ex. 27. Former Aide provided services to Student prior to the 2003-2004 school year. See Testimony of Former Aide, pp. 396-397; D. Exs. 10 & 12. Appropriate aide services were provided by Instructional Aides. Testimony of Instructional Aides & Assistant Special Education Director & other District personnel.

24. On or about October 7, 2003, Student's leg braces were improperly placed on Student so that a hard plastic portion of one brace put extensive, painful pressure on Student's foot for most of the school day. Parents required that District no longer remove Student's leg braces and/or shoes at school, and subsequently District personnel have not removed Student's leg braces or shoes. D. Ex. 1 & P. Ex. 15 [10/8/03 letter from Father]; Testimony of Mother, Tr. pp. 404-405.

5/12/04 IEP Findings of Fact

25. On May 12, 2004, an IEP meeting was held, and the 5/12/04 IEP was developed. D. Ex. 12; P. Ex. 13. Father objected to the goals and objectives for the physical and occupational therapy included in the 5/12/04 IEP. Father objected to the District's physical therapist providing services. D. Ex. 12, at 20.

26. On May 13, 2004, District provided a prior written notice to Parents regarding the 5/12/04 IEP and Father's objections to that 5/12/04 IEP. D. Ex. 12, at 20; P. Ex. 14; Testimony of Assistant Special Education Director, Tr. pp. 374-375.

27. Among other things, the 5/12/04 IEP provided that (1) occupational therapy would be provided one hour per month by OT/Sped staff, and (2) physical therapy would be provided one hour per week by PT/Sped Staff. D. Ex. 12, at 13; P. Ex. 13, at 13. The IEP team intended that direct services be provided by the occupational therapist and physical therapist for the time listed. Testimony of Special Education Director, Tr. p. 301; Testimony of Occupational Therapist, Tr. pp. 138-139.

28. The 5/12/04 IEP included (1) goals and objectives for occupational therapy recommended by Occupational Therapist; and (2) goals and objectives for physical therapy that were included in the 2003-2004 IEP. Parents refused to allow Former Physical Therapist to provide physical therapy services (and Father discouraged input from another physical therapist during the IEP meeting because the therapist had not met with Student at that time), and no progress reports or recommendations for physical therapy goals were provided from Mexico Therapist. D. Ex. 1 [10/14/04 letter from Special Education Director]; Testimony of Special Education Director, Tr. pp. 330-331.

29. During the time period governed by the 5/12/04 IEP during the 2004-2005 school year, Occupational Therapist provided OT services to Student for District, and Occupational Therapist was qualified to provide such services. Tr. pp. 119-121 & 145.

30. As of the beginning of the 2004-2005 school year, District had contracted with Private Physical Therapy Company to provide physical therapy services to District.

students, including Student. Testimony of Special Education Director, Tr. pp. 289-290. Parent objected to provision of physical therapy by Private Physical Therapy Company on several grounds, including that Parents had not received such therapists' qualifications and that Parents had not received proof that Student's IEP services would be provided. D. Ex. 1 [10/4/04 letter from Parent]; Tr. pp. 291-292. Parents and District later agreed that Physical Therapist, a specific therapist with Private Physical Therapy Company, could provide, and Physical Therapist thereafter has provided, physical therapy services to Student. Testimony of Physical Therapist.

31. Speech Therapist has provided speech therapy services to Student since the beginning of the 2003-2004 school year, without objection from Parents. According to Speech Therapist, assistive technology may be useful in the future, but it is not essential, for meeting Student's speech goals in Student's 5/12/04 IEP. Testimony of Speech Therapist, Tr. pp. 309-310, 312.

32. Instructional Aides who provided services to Student in the 2004-2005 school year all have an associates degree or at least 60 hours of college credits (Aides 1, 2, 3, 5, & 6) or have been working for District prior to January 8, 2002 (Aide 7, Tr. pp. 262-263). Testimony of Instructional Aides & P. Ex. 27. Some college credits are earned equivalency credits from Mexico colleges; for example, Aide 3 has a medical degree in Mexico, and has had at least 111 credit hours determined as equivalent in the United States, and has 17 years experience as a therapist working with handicapped children in Mexico. Testimony of Aide 3, Tr. pp. 86, 92.

33. There was extensive evidence that Special Education Teacher is a highly dedicated, caring, teacher who has established an excellent, caring class for students with severe disabilities. See, e.g., Testimony of Special Education Teacher; D. Ex. 14 (& Tr. p. 24); Testimony of Occupational Therapist, Tr. pp. 125-126.

34. Special Education Teacher has a masters degree in special education. Special Education Teacher holds an emergency teaching certificate, issued by the Arizona Department of Education, for the 2004-2005 school year for District in Cross Categorical Special Education. Testimony of Special Education Teacher, Tr. pp. 16, 38; P. Ex. 27.

35. On August 17, 2004, at the end of the school day, after the special needs bus left Student's school but before it reached Student's home, the air conditioning malfunctioned. Since the bus was more than half way to Student's home, the bus continued transporting Student home. In 2001, air-conditioning on District buses transporting Student had previously malfunctioned. To accommodate Parents' concerns that Student be transported in an air-conditioned environment (despite the fact that District regularly maintains its buses but cannot guarantee malfunctions will not occur), District previously modified the bus schedule so that Student is the last student picked up by the bus on the way to school and the first student dropped off after school. Based on this schedule change, Student's entire bus trip is 5 minutes. Parents had previously instructed District that Parents were to be called whenever the air-conditioning was not working on the bus. Based on this incident, where Student could not have been exposed to lack of air-conditioning for more than four minutes, Father sent a letter asserting this incident was "an act of negligence and abuse" that would be reported to necessary agencies. Testimony of Mother, Tr. p. 409; Testimony of

Assistant Special Education Director, Tr. pp. 370-371; Testimony of Transportation Director; D. Ex. 2; P. Ex. 12. There was insufficient evidence to show that five minutes without air-conditioning poses any physical risk to Student. See P. Ex. 12.

36. Parents will not accept compensatory services for OT or physical therapy services. D. Ex. 1 [2/24/04 letter from Father, at p. 2].

37. As of February 3, 2005, Student was determined to be functioning intellectually within the Profound Mental Retardation Range. D. Ex. 9. Student was previously diagnosed with severe mental retardation at an earlier age, but a more precise level of ability can only be ascertained as Student has grown older. Testimony of District Psychologist, Tr. pp. 345-346.

38. On February 11, 2005, an IEP meeting was held, and an IEP was developed ("2/11/05 IEP"). P. Ex. 26.

IV. CONCLUSIONS OF LAW; RATIONALE

A. Burden of Proof.

The Ninth Circuit Court of Appeals has consistently held that the school has the burden of proving compliance with the Individuals with Disabilities Education Act, 20 U.S.C. Section 1400, *et. seq.* (1997) ("IDEA" or "IDEA 1997"), at the Due Process Hearing. *Seattle School District v. B.S.*, 82 F.3d 1493, 1498 (9th Cir. 1996); *Clyde K. v. Puyallup School District*, 35 F.3d 1396, 1398 (9th Cir. 1994). Burden of proof is the duty of affirmatively proving a fact in dispute. District has the burden of proving, by a preponderance of the evidence, that District has complied with the requirements of IDEA, and provided a free appropriate public education ("FAPE") to Student.

B. Provision of FAPE During the 2003-2004 School Year

FAPE requires that special education and related services be provided at public expense in conformity with the IEP required by IDEA. 20 U.S.C. §1401(8); 34 C.F.R. § 300.350. See also *Board of Education v. Rowley*, 458 U.S. 176, 188 (1982) (citing the FAPE requirements set out in IDEA).

1. Provision of Occupational and Physical Therapy Services

Related services are developmental, corrective and other supportive services as are required to assist a child with a disability to benefit from special education. 20 U.S.C. §1401(22); 34 C.F.R. § 300.24(a). Student must be provided related services which are individually designed to provide educational benefit to Student. *Board of Education v. Rowley*, 458 U.S. 176, 203 (1982). Occupational therapy is a related service. 34 C.F.R. § 300.24(a) & (b)(5).

District established that occupational therapy services were provided as required by Student's 2003-2004 IEP except for one hour of services in late January, 2004, and services that were not provided because Father objected to such provision of services. Parents have the right to refuse services offered by District to Student, but District has provided FAPE by making such services available. The availability of any remedy for the one hour of missed services is addressed in Section D below.

Physical therapy is also a related service. 34 C.F.R. § 300.24(a) & (b)(8). District did not provide physical therapy services to Student because Parents refused to allow Former Physical Therapist to provide such services. Parents have the right to refuse services offered by District to Student. But, IDEA does not grant Parents the right to approve, dictate, or otherwise determine what therapist District may use. Such right would paralyze the provision of educational services to students by schools. Parents view that Former Physical Therapist's prior services did not result in progress for Student, or Parents disagreement with the level of services previously recommended by Former Physical Therapist, did not justify a refusal of services from that therapist that would warrant reimbursement for Parents' unilateral services, as more specifically addressed in Section D below.

2. Provision of Supplementary Aids and Services

District established that the [REDACTED] was used with Student as required by Student's 2003-2004 IEP. Although District did not keep track of specific minutes that the [REDACTED] was used with Student every day, District is not obligated to specifically time and record minutes of use in order to provide FAPE.

There was some evidence that the [REDACTED] device was provided for Student as required by Student's 2003-2004 IEP, but that such device was broken for some period of time. District did not provide evidence of when that device was broken or when it was repaired.

3. Provision of Appropriate Aide Services By Qualified Personnel

IDEA provides that paraprofessionals and assistants who are appropriately trained and supervised, in accordance with Arizona law, regulations, or written policy, may be used to assist in the provision of special education and related services to children with disabilities. 20 U.S.C. §1412(a)(15); 34 C.F.R. §300.136(f). Arizona regulations authorize "paraeducators" such as Instructional Aides to assist with the education of students. Ariz. Admin. Code § R7-2-401(B)(18).

IDEA 1997 does not, by its terms, require that District comply with the educational requirements of the No Child Left Behind Act of 2001, 20 U.S.C. § 6301 et. seq. ("NCLBA") in order to provide FAPE. NCLBA requires that Instructional Aides hired by District after January 8, 2002, shall have completed at least 2 years of study at an institution of higher education or have an associates degree, or pass a proficiency test. 20 U.S.C. § 6319(c)(1). Although Parents dispute that such NCLBA requirements have been satisfied by all instructional aides providing services to Student, the evidence presented established that Instructional Aides providing services to Student under the 2003-2004 IEP have satisfied these requirements. Although Parents assert some additional training is required, there is no other legal standard that applies. The evidence also established that appropriate aide services were provided to Student. Thus, appropriate aide services were provided to Student by qualified aides.

C. Provision of FAPE During the 2004-2005 School Year

1. Provision of Prior Written Notice

Parents must be provided prior written notice (and information on procedural safeguards) if the school proposes (or refuses) to initiate or change the educational

placement of a child. 20 U.S.C. 1415(b)(3) & (c); 34 C.F.R. §300.503(a)(1). That prior written notice must be provided within "a reasonable time". 34 C.F.R. §300.503(a)(1). District provided such notice within one day after the May 12, 2004 IEP meeting, in compliance with IDEA.

2. Goals for Occupational and Physical Therapy

IDEA's implementing regulations require that an IEP include measurable annual goals. 34 C.F.R. § 300.347(a)(2). The OT goals in the 5/12/04 IEP were formulated based on recommendations from the Occupational Therapist, and considered by Student's IEP team in an IEP meeting. There was no evidence that would indicate that those goals were not appropriate.

The physical therapy goals included in the 5/12/04 IEP were not modified from the goals in the 2003-2004 IEP. The IEP team decided to retain those goals since Parents were not accepting physical therapy services from District's provider, and the IEP team had no information on Student's progress to update those goals. Given these facts, District provided FAPE to Student regardless of whether such physical therapy goals continued to be appropriate.

3. Personnel Providing Occupational and Physical Therapy Services

District established that licensed OT and PT therapists were retained by District to provide services to Student and other District students. Parents have no right to approve which therapists are employed by District. School districts could not function if every parent held a veto power on which professionals could provide services to their children. *Compare Ms. S. v. Vashon Island School Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003).

4. Assistive Technology Requirement for Speech

Assistive technology was not required in order for Student to meet Student's speech goals under the 5/12/04 IEP and provide FAPE to Student. See FOF ¶ 31.

5. Provision of Appropriate Aide Services By Qualified Personnel

The Instructional Aides providing services to Student under the 5/12/04 IEP have satisfied the requirements of IDEA and NCLBA, as discussed in Section B(3) above. Those aides were qualified and trained to, and did, meet Student's safety needs.

6. Qualifications of Special Education Teacher

The evidence established that Student's Special Education Teacher is a highly dedicated, caring, teacher who has established an excellent class for students with severe disabilities. Special Education Teacher has a masters degree in special education, and holds an emergency teaching certificate for Cross Categorical Special Education. IDEA 1997 authorizes each state to determine appropriate professional requirements for teachers in that state. 20 U.S.C. §1412(a)(15); 34 C.F.R. §300.136. There are no specific legal requirements in Arizona for "life skills" training.

Arizona regulations provide for issuance of emergency teaching certificates for a one year period that authorize District to employ Special Education Teacher. Ariz. Admin. Code § R7-2-612. Arizona regulations provide that a holder of a Cross Categorical Special Education certificate is "qualified to teach students with mild to

moderate mental retardation, emotional disability, specific learning disability, orthopedic impairments and other health impairments". Ariz. Admin. Code § R7-2-610(C)(2) & (D)(2). Arizona regulations further provide for issuance of a Severely and Profoundly Disabled Certificate; however those same regulations do not identify what a holder of such a certificate is qualified to teach. See Ariz. Admin. Code § R7-2-610(G) & (H).

Given the extent of Student's disabilities, it may be more desirable to have a special education teacher who holds a Severely and Profoundly Disabled Certificate to provide special education services to Student. However, there is not a specific legal requirement for a Severely and Profoundly Disabled Certificate, even though during the relevant time period Student had been evaluated as severely mentally retarded. Special Education Teacher is as dedicated to providing quality special educational services to Student as any school district could hope to find. District has established that Special Education Teacher is appropriately educated and trained to provide FAPE to Student.

7. Provision of Air Conditioned Transportation

District has exceeded its obligations in providing appropriate transportation for Student and in addressing Parents' requests with regard to District's provision of air conditioned transportation.

D. Analysis of Legal Remedies

Parents specifically requested reimbursement, not compensatory education, in connection with OT and physical therapy service issues. Specifically, Parents requested reimbursement for 34 hours of physical therapy services from February 27, 2004 to November 26, 2004, and 59 hours of OT services from August 13, 2003, to November 26, 2004. All such services were provided by Mexico Therapist.

There are no explicit requirements for reimbursement for related services under IDEA. IDEA and its implementing regulations do provide standards for reimbursement for unilateral private school placement in 34 C.F.R. §33-403(c). Those requirements are applied here, by analogy, to Parents' requested reimbursement. Reimbursement is not justified if District has made FAPE available to the child in a timely manner. See 34 C.F.R. §33-403(c). Reimbursement may also be denied if parents do not provide notice of their intent to provide unilateral services. See 34 C.F.R. §33-403(d). Additionally, reimbursement for related services, like compensatory education, is an equitable remedy. As the Ninth Circuit Court of Appeals has recognized, there is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. *Parents of Student W v. Puyallup Sch. Dist.*, 31 F.3d 1489 (9th Cir. 1994).

In this case, physical therapy services were made available during the entire period that Parents seek reimbursement. The only reason that physical therapy services were not provided to Student by District is because Parents rejected the District's qualified service provider. On these facts, Parents are not entitled to reimbursement for physical therapy services.

A reasonable person reviewing Parents' December, 2003, and January, 2004 request for reimbursement for OT services would have understood that unilateral OT services had not yet been provided to Student by Parents. Thus District had no notice of Parents' intent to contract for OT services in the fall of 2003. District had actually provided some OT services required to be provided to Student in the fall of 2003. For OT services not provided by District in the fall of 2003, District reimbursed Parents. District actually provided all but one hour of OT services in the spring of 2004, except as such services were objected to by Parents. District also provided OT services as required by Student's 5/12/04 IEP. Since District has provided all but one week of OT services except in response to Parents' unsupported objections to service providers, reimbursement is not justified. Denial of reimbursement for one hour of OT services is also justified by Parents failure to establish that Mexico Therapist was actually qualified to provide OT services. Compare 34 C.F.R. §33-403(c)(for entitlement to reimbursement for a parent's unilateral placement, such private placement must be "appropriate").

As described above, the only specific issue that District failed to prove was District's provision of the [REDACTED] augmentative communication device under the 2003-2004 IEP. Parents did not request a specific remedy for this alleged failure.

Parents have legal rights, and the right to exercise those legal rights. Parents desire for a perfect education and a perfect world for Student is understandable, but it is not achievable or required by IDEA. See *Board of Education v. Rowley*, 458 U.S. 175, 199 (1982) (IDEA does not require every special service necessary to "maximize" a student's potential). There was no evidence that the [REDACTED] device was required to ensure that Student is appropriately educated within the meaning of the IDEA. *Parents of Student W v. Puyallup Sch. Dist.*, 31 F.3d 1489 (9th Cir. 1994). Based on this, and the adverse effect on District of Parents' unreasonable accusations regarding District and District personnel, a remedy for any failure to provide the Tech Talk device is denied on equitable grounds.

E. Arizona Regulation Findings

The Arizona regulations governing due process standards for special education require that a hearing officer render findings of fact and a decision on specific identified issues. Ariz. Admin. Code § R7-2-405(H)(4). Those specific issues are addressed as follows:

- (i) There is no evidence that the evaluation procedures utilized in determining Student's needs have not been appropriate in nature and degree.
- (ii) The diagnostic profile of Student on which Student's current placement is based is substantially verified.
- (iii) Student's rights have been fully observed.
- (iv) Student's placement is appropriate to the needs of Student.
- (v) The placement of Student in the special education program is with the written consent of Parents.

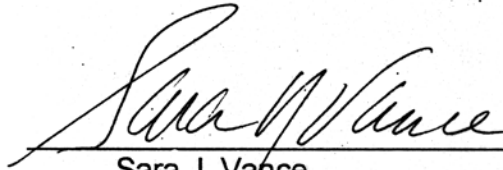
IV. ORDER

IT IS ORDERED that Parents' requested relief is denied.

V. APPEAL

Either party has the right to appeal this Decision to the Office of Administrative Hearings within thirty five (35) calendar days after receipt of this Decision. Ariz. Admin. Code § R7-2-405(H)(5). Requests for appeal must be submitted in writing to: Dispute Resolution Coordinator, Arizona Department of Education, Exceptional Student Services, 1535 W. Jefferson, Phoenix, Arizona 85007. Ariz. Admin. Code § R7-2-405(J)(1).

Ordered this 12th day of April, 2005.



Sara J. Vance
Due Process Hearing Officer